

STATEMENT OF  
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PAST PRESIDENT OF THE  
NATIONAL ORGANIZATION OF VETERANS ADVOCATES  
BEFORE THE  
SUBCOMMITTEE ON  
DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS  
VETERANS' AFFAIRS COMMITTEE  
UNITED STATES HOUSE OF REPRESENTATIVES  
APRIL 17, 2007

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to present the views of the National Organization of Veterans' Advocates ("NOVA") on the following bills: (1) H.R. 67; (2) H.R. 1435; (3) H.R. 1444 and (4) H.R. 1490. NOVA is a not-for-profit § 501(c)(3) educational organization created for attorneys and non-attorney practitioners who represent veterans, surviving spouses, and dependents before the Court of Appeals for Veterans Claims ("CAVC") and on remand before the Department of Veterans Affairs ("DVA"). NOVA has written many *amicus* briefs on behalf of claimants before the CAVC and the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). The CAVC recognized NOVA's work on behalf of veterans when it awarded the Hart T. Mankin Distinguished Service Award to NOVA in 2000. The positions stated in this testimony have been approved by NOVA's board of directors and represent the shared experiences of NOVA's members as well as my own sixteen-year experience representing claimants at all stages of the veteran's benefits system from the Regional Office to the Board of Veterans Appeals to the CAVC as well as before the Federal Circuit.

## **I. H.R. 67 Veterans Outreach Improvement Act of 2007**

This bill if enacted would increase the funding provided for outreach activities and require increased cooperation and coordination amongst the various state agencies and their federal counterparts. It has been my experience that the Department of Veterans Affairs has many excellent programs which truly can help our most vulnerable veterans. The veterans most in need of these services are the ones most likely to go unaware of their existence.

In addition, our returning soldiers are often ill-prepared for the transition to civilian life following their time in service. This can be an extremely stressful time, even without the bureaucratic hassles. Some veterans are reluctant to use VA services either because of pride or the feeling that they do not deserve these benefits. As a consequence, many eligible veterans do not know what VA programs are available to them. Finally, most veterans simply do not have the patience to wade through the avalanche of paperwork that confronts them when they do approach the VA.

Congress and the people of this country are truly in debt to this nation's veterans, and in response we have provided our nation's veterans with some excellent benefits. But that debt remains unpaid when our veterans go unaware of the benefits they deserve. NOVA believes that H.R. 67 is critical for veterans and fully supports this bill.

## **II. H.R. 1435 Department of Veterans Affairs Claims Backlog Reduction Act of 2007**

The goal of this bill is to help clear the backlog of approximately 500,000 cases pending at the regional offices around the country. NOVA believes this is a laudable goal and supports reasonable measures that will directly advance that goal.

The bill would in essence out-source the development of certain claims to the County Veterans Service Officers. The Secretary would be required to identify and classify claims in the backlog that need further development. Once the claims needing further development are identified by the Secretary, they would be referred to the County Service Officers for development.

It has been NOVA's experience that one of the most time consuming steps in the adjudication of claims is indeed the development of claims. There are two critical parts to the development process. First, the Secretary is required to examine the evidence on each claim and then determine what evidence needs to be obtained or developed in order to rate a claim. Second, a letter is sent requesting that evidence and the file is calendared forward for follow-up by the Regional Office. It is at the first step in the process of development that the Secretary needs to devote more resources. Analyzing the evidence in the veteran's VA claims file to ascertain what needs to be developed consumes significantly more time than requesting the information. NOVA believes it would behoove Congress to consider adding more staff to the VA Regional Offices to review the claims in the backlog and identify the evidence that needs to be developed.

NOVA is also concerned about who would have responsibility for the VA claims folder once it is placed with the County Service Officers. For example, once the file is transferred to

the County Service Officer, does the veteran call the VA or the County Service Officer for updates on the case? As this committee is well aware over the last few years there have been a number of serious security breaches at the VA. This bill does not address how security will be maintained when cases are transferred to the County Service Officers. Finally, if a VA file is lost in the transfer process, this would result in even greater delay.

County Service Officers provide excellent service to thousands of veterans every day. We do not believe that they should do the VA's job for it, however. It is unclear how this law would make the current process more efficient, and it would take valuable time from County Service Officers whose expertise will be needed more each day as our soldiers returning from Iraq and Afghanistan separate from service and apply for benefits.

### **III. H.R. 1444 INTERIM PAYMENTS FOR CERTAIN REMANDED CLAIMS**

#### **A. The Need for a Remedy for Delay**

##### ***1. Remanded Claims in General***

A claimant who files a new claim for benefits that is denied by the VA usually faces a three- to five-year horizon before he or she receives a decision from the Board of Veterans' Appeals. Unfortunately, what many of these veterans receive from the Board of Veterans' Appeals is not a final decision on their claim but a remand to the regional office for more development. The following statistics<sup>1</sup> tell the story of the percentage of cases remanded by the Board each year:

(1) Fiscal Year 2003: 42.6%;

(2) Fiscal Year 2004: 56.8%;

(3) Fiscal Year 2005: 38.6%

(4) Fiscal Year 2006: 32.0%

When a veteran receives a final adverse decision from the Board of Veterans' Appeals, he or she has the right to appeal the case to the United States Court of Appeals for Veterans Claims ("CAVC"). Since the CAVC's creation in 1988, on average 60% to 65% of the cases that receive a merits determination from the Court are in turn remanded back to the Board. Over the last two years, the number of appeals to the CAVC has increased by about 30% each year which shows increased dissatisfaction with the decisions from the Board of Veterans' Appeals.<sup>2</sup>

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<sup>1</sup> This data was obtained from the "Report of the Chairman of the Board of Veterans' Appeals for Fiscal Year 2006.

<sup>2</sup> This data is from the annual reports of the CAVC's and is available at [http://www.vetapp.gov/documents/Annual\\_Reports.pdf](http://www.vetapp.gov/documents/Annual_Reports.pdf).

The time the case takes in Court can range from a low of three months to more than two years. The problem is that many claimants do not survive the adjudicatory process. Those claimants who do survive are subjected to interminable delays before the VA.

## ***2. Remanded Claims and the Right To Expeditious Treatment***

In 1994, Congress enacted the Veterans Benefits Improvement Act. Section 302 of the Act, Pub.L. No. 103-446, § 302, 108 Stat. 4645, 4658 (1994), which provided for expeditious treatment for veterans claims that were remanded from the Court of Appeals for Veterans Claims back to the Board of Veterans Appeals. In addition, the same Act required claims remanded from the Board to the Regional Offices to receive expeditious treatment. The statute specifically mandates that “[t]he Secretary of Veterans Affairs shall take such actions as may be necessary to provide for the expeditious treatment, by the Board of Veterans' Appeals and by the regional offices of the Veterans Benefits Administration, of any claim that has been remanded by the Board of Veterans' Appeals or by the United States Court of Veterans Appeals for additional development or other appropriate action.” This act was codified in 2003 by P. L. 108-183, Title VII, § 707(a)(1), 117 Stat. 2672 at 38 U.S.C. § 5109B. It provides that “[t]he Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the appropriate regional office of the Veterans Benefits Administration of any claim that is remanded to a regional office of the Veterans Benefits Administration by the Board of Veterans' Appeals.” In addition, P. L. 108-183, Title VII, § 707(a)(1), 117 Stat. 2672 codified the VBIA at 38 U.S.C. § 7112 which provides that the Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the Board of any claim that is remanded to the Secretary by the Court of Appeals for Veterans Claims.

The intent behind the VBIA 1994 and the subsequent statutory codification is clear: Congress wants those claimants who have been unable to get a final decision from the Board to thereafter receive expeditious treatment whether on remand from the CAVC or on remand from the BVA to the Regional Offices. The problem is the VA has failed to execute the will of Congress.

### **3.     ~~Delay~~— ~~Not Expeditious Treatment~~— Is the Norm**

Typically, veterans face years of delay instead of receiving the expeditious treatment required by Congress. Delay occurs at two critical junctures:

- (1)     When a case is remanded from the Court to the Board, and
- (2)     When the Board remands a case back to the RO and the denial is sustained by the RO. In this latter situation, the matter is supposed to retain its earlier Board docket number but most cases are assigned new docket numbers. Docket numbers are important because the Board is required to decide cases in order of their docket numbers.

As noted above, the first significant time delay occurs when the cases are remanded from the CAVC to the Board of Veterans Appeals. When a case is remanded from the Court to the Board, the Board is required to allow the claimant and the representative of record 90 days to submit additional evidence. Once the claimant or the representative respond, the Board is required to render a new decision. In my experience, claimants are generally waiting between 6 months to a year for a new decision once the cases is remanded from the CAVC to the Board of Veterans' Appeals.

The second situation, when the Board remands a case back to the Regional Office, causes

far more grievous delay, especially where the RO grants a part of the claim, but then commits error by denying less than the full relief required by law. In that situation, Congress requires that the BVA expeditiously review the RO's decision, but often it does not.

### **B. The Remedy- Interim Payments for Certain Remanded Claims**

As set forth above, the Secretary has not been able to make a decision within 180 days of a remand. In fact, in the VA adjudication system, the Secretary does not really have any deadlines within which he must make a decision.

H.R. 1444 seeks to ameliorate the harsh effects caused by the remand delay by requiring the Secretary to make interim payments. NOVA supports this goal. Nevertheless, the language of the bill raises the following issues:

1. For some disabilities like tinnitus, the maximum rating possible under the VA rating schedule is only 10% which presently equals \$115.00 per month. If a veteran files a claim for VA disability benefits for one of the conditions where the maximum rate payable under the VA rating schedule is less than \$500.00 per month, this could cause some unintended negative consequences.
2. What if a veteran files claims for multiple conditions and all are remanded. Is there just one \$500.00 payment per month for the veteran or is there \$500.00 for each claim?
3. Some have suggested that the practical effect of this bill would be for the VA just to deny the claims outright as the 180 day time limit approaches. To prevent this from happening, Congress should define "final decision" and "finally decided" as the point in time when the veteran has exhausted all administrative and court appeals.



#### **IV. H.R. 1490 PRESUMPTION OF SERVICE-CONNECTEDNESS FOR SUBMITTED CLAIMS.**

This bill if enacted would represent a profound change in the manner in which VA adjudication of claims occurs. A claim filed by a veteran would be presumptively valid unless the Secretary determines there is affirmative evidence to the contrary. Once a claim is granted, it might not be reviewed for years because only a percentage of the claims granted under this provision will actually be audited. In addition, the bill would require the Secretary to redeploy VA personnel from processing and rating activities to assist veterans with their claims.

NOVA believes this bill is extraordinarily veteran friendly and seeks to provide a solution to the claims processing delays that occur at the VA. We fully support the generous intent of this bill. However its effect is unclear.

NOVA is concerned that one possible outcome is that the VA would simply change the boilerplate language in its decisions to say that "there is positive evidence to the contrary" of the veteran's claim and the VA would deny just as many claims as it presently does. By way of example, under the current law, a veteran is supposed to receive the "benefit of the doubt" when the evidence for and against his claim is in equipoise. One would assume this doctrine would lead to many granted claims in situations where there is no evidence for or against a veteran's claim, such as when his service records have been lost or destroyed by the VA. But this is not the case. The benefit of the doubt doctrine is effectively rendered meaningless due to the VA's inclusion of the following line in many of its decisions: "The preponderance of the evidence is against the claim," so "the benefit of the doubt doctrine is therefore not for application." NOVA foresees a similar development as a result of this bill.

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Since 1991, Mr. Chisholm has been representing veterans before the United States Court of Appeals for Veterans Claims (CAVC) and the Department of Veterans Affairs (DVA). In that time, he has successfully represented hundreds of veterans in Court and before the Department of Veterans Affairs. In addition, Mr. Chisholm has represented veterans before the United States Court of Appeals for the Federal Circuit. Mr. Chisholm has also written numerous briefs as friend of the court in support of other veterans' cases. In 1998, Mr. Chisholm was elected to serve as the President of the National Organization of Veterans Advocates ("NOVA") and served in that capacity until 2004. Mr. Chisholm has presented at NOVA conferences in the past and at the CAVC Judicial Conference. Mr. Chisholm was also elected to serve as the President of the CAVC Bar Association in 2002.

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Neither Mr. Chisholm nor NOVA have received any federal grant money or contract work in the last two years related to this testimony.